

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

JOHN LEGRAND,

Plaintiff,

vs.

DARIN YOUNG, WARDEN; AND THE
ATTORNEY GENERAL OF THE STATE OF
SOUTH DAKOTA,

Defendants.

4:14-CV-04160-RAL

ORDER DENYING MOTIONS FOR
CERTIFICATE OF APPEALABILITY AND
APPOINTMENT OF COUNSEL

Plaintiff/Petitioner John LeGrand is a prisoner confined to the South Dakota State Penitentiary who filed a petition for writ of habeas corpus in this Court under 28 U.S.C. § 2254. This Court issued an Opinion and Order Denying Petition for Writ of Habeas Corpus, Doc. 14, and entered Judgment of Dismissal, Doc. 15, in favor of Defendants and against LeGrand.

On June 8, 2015, LeGrand filed a Notice of Appeal. Doc. 16. With that Notice of Appeal, LeGrand filed a Notice of In Forma Pauperis Status, Doc. 17, a Motion for Court Appointed Counsel, Doc. 18, and a Motion/Brief Requesting Certificate of Appealability, Doc. 20. Generally when a notice of appeal is filed in district court following entry of final judgment, the district court lacks jurisdiction to rule further. However, the United States Court of Appeals for the Eighth Circuit commonly has expected this Court to rule on whether an inmate pursuing an appeal qualifies for in forma pauperis status, and both 28 U.S.C. § 2253(c) and Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts leave it to the district

court to determine whether a certificate of appealability should issue and, if so, on what issue or issues. Typically this Court includes a ruling on whether a certificate of appealability will issue as part of the opinion and order or judgment, but did not do so here.

A certificate of appealability issues “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). For the reasons explained in the Opinion and Order Denying Petition for Writ of Habeas Corpus, Doc. 14, LeGrand is not entitled to relief under 28 U.S.C. § 2254. The standard of § 2253(c)(2) of a “substantial showing” is a lower standard than showing entitlement to relief under § 2254. See Khaimov v. Crist, 297 F.3d 783, 785-86 (8th Cir. 2002); Kramer v. Kemna, 21 F.3d 305, 307 (8th Cir. 1994). Nevertheless, having devoted considerable time to reviewing the record and considering all of LeGrand’s claims of constitutional defects made in his § 2254 petition, this Court concludes that LeGrand has not made “a substantial showing of the denial of a constitutional right” under § 2253(c)(2) to justify issuance of a certificate of appealability. See Kramer, 21 F.3d at 307.

LeGrand is indigent and this Court previously has decided that he is entitled to proceed in forma pauperis. Docs. 4, 7. Having already issued judgment and having here declined to issue a certificate of appealability, this Court will not appoint counsel for LeGrand, but defers naturally to the Eighth Circuit to the extent that the motion is made following filing of the Notice of Appeal. Therefore, for good cause and for the reasons contained in the Opinion and Order Denying Petition for Writ of Habeas Corpus, Doc. 14, it is hereby

ORDERED that LeGrand’s Motion/Brief Requesting Certificate of Appealability, Doc. 20, is denied. LeGrand, however, may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. It is further

ORDERED that LeGrand's Motion for Court Appointed Counsel, Doc. 18, is denied in this Court but otherwise is left for the United States Court of Appeals for the Eighth Circuit to decide. It is finally

ORDERED that LeGrand's Notice of In Forma Pauperis Status, Doc. 17, is construed as a motion to proceed in forma pauperis on appeal and is granted.

DATED this 28th day of July, 2015.

BY THE COURT:

A handwritten signature in blue ink, appearing to read "Roberto A. Lange", is written over a horizontal line.

ROBERTO A. LANGE
UNITED STATES DISTRICT JUDGE